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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-5187

Phillip Jerome Lee,

Petitioner,

v.

United States of America,

Respondent.

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO
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Phillip Jerome Lee respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case (No. 75-1836) on July 21, 1976.

OPINION BELOW

The opinion of the court of appeals has not as yet been reported. A copy of that opinion is included as Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on July 21, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the petitioner was denied due process.
2. Whether the petitioner was twice put in jeopardy.

## CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;... nor be deprived of life, liberty or property, without due process of law...."



## STATEMENT OF THE FACTS

The petitioner, Phillip Jerome Lee, was brought to trial on July 16, 1974, in the United States District Court for the Northern District of Indiana, Fort Wayne Division, for the alleged robbery of Charles Bilskie (Billskie) on December 21, 1973. A bench trial was held, at the beginning of which the petitioner moved for dismissal of the information because it failed to allege that the offense was committed knowingly and with the intent to deprive the owner of the use and benefit of the property.

The District Court judge took this motion under advisement and proceeded to hear the United States Attorney's entire case. The petitioner again made a motion to dismiss and then rested. After stating that there was no doubt in his mind as to the petitioner's guilt, the District Court judge dismissed the information because of the defect appearing on its face, stating, "No such allegation is contained, no matter how I stretch my imagination when I read the information. There is nothing here that smacks of an element of intent." (Transcript of Trial on July 16, 1974, pages 67-68).

On September 25, 1974, a Grand Jury returned an indictment charging the petitioner with the same crime concerning the same event. The petitioner was arraigned before the same District Court judge, who then disqualified himself because of his earlier comments concerning the petitioner's guilt. On June 23, 1975, the petitioner was tried in a bench trial before another District Court judge and found guilty.

## REASONS FOR GRANTING THE WRIT

### I. DUE PROCESS WAS VIOLATED BY THE ACTIONS OF THE UNITED STATES ATTORNEY AND THE DISTRICT COURT JUDGE.

The petitioner was brought to trial the first time under an information that was defective on its face. His lawyer moved immediately to dismiss the information for that reason. The United States Attorney declined to amend it, and the District Court judge was determined to proceed. The trial continued through the presentation of all the evidence. At the end of the case the trial judge dismissed the information because of the defect on its face.

In this situation, the United States Attorney should have asked leave to amend the information before the cause was pursued through the presentation of all the evidence. When the United States Attorney failed in that duty, the trial judge should have dismissed the information.

Instead of so acting, they allowed the petitioner to sit through the psychological trauma of a complete trial. As far as the petitioner was concerned, he was being tried for robbery in a Federal court; he suffered all the fear and anxiety that attend such a proceeding for a defendant. This course of action by the United States Attorney and by the District Court judge must be considered an abuse serious enough to have violated petitioner's Fifth Amendment right to due process of law.

### II. THE SECOND TRIAL FOR THE SAME ALLEGED OFFENSE VIOLATED THE PETITIONER'S FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY.

Despite the fact that the original information was defective, the cause was pursued twice to the conclusion of all



the evidence. After he had heard all the evidence, the trier of fact, the District Court judge, went so far as to conclude and state that on the evidence presented he had no doubt as to the defendant's guilt. He then dismissed the case because he considered the information defective. The judge later considered his comment as to the defendant's guilt sufficient to disqualify himself from a second trial, and said that he had very serious questions in this case in regard to double jeopardy. (Arraignment, February 6, 1975).

Though there are holdings of this Court to the effect that jeopardy does not attach to a trial based on a faulty charge, it cannot be denied that the petitioner was placed in factual and psychological jeopardy. In the first trial, the petitioner's lawyer immediately moved to dismiss the information as faulty. Neither the United States Attorney nor the District Court judge was willing to agree with this contention. The petitioner, a layman, reasonably expected they would never agree and that their view might--though erroneous--prevail. The crime carried a heavy penalty.

This Court has often expressed a concern that a defendant should not be made to suffer the psychological trauma of a complete trial twice for the same alleged offense. Green v. United States, 355 U.S. 174, 78 S.Ct. 221 (1957).

In Downum v. United States, the jury was impanelled for the first trial but the prosecutor was not ready to proceed. This Court held that the prosecutor's neglect caused jeopardy to attach to that first trial. Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033 (1963). In United States v. Jorn, the trial judge discharged the jury in the first trial over the defendant's objection because the judge thought that the witnesses had not been properly warned of their rights. This Court held that such an abuse of discretion by the judge caused jeopardy to attach to

that first trial. United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547 (1971). In United States v. Jenkins, the District Court judge dismissed the indictment, before any evidence was heard, for reasons other than a finding of guilt or innocence. This Court held that jeopardy attached to that trial, stating that "it is enough for purposes of the Double Jeopardy Clause,...that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006 (1975).

The petitioner claims that his first trial was similar to the first trials in the above-mentioned cases because of the neglect of the United States Attorney in failing to amend the information, because of the abuse of discretion by the District Court judge in pursuing the trial to the end of the case, and because the first information was dismissed for reasons other than a factual determination of guilt or innocence.

The petitioner claims that in his situation jeopardy attached to his first trial, and that a second prosecution amounted to a violation of his Fifth Amendment protection against double jeopardy.

## CONCLUSION

The events in this series of trials deprived the petitioner of due process of law and also subjected him to double jeopardy, both in violation of the Fifth Amendment. Therefore, the petitioner requests that certiorari be granted and that his conviction be reversed.

Respectfully submitted,

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In the

# United States Court of Appeals

## For the Seventh Circuit

No. 75-1836

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

PHILLIP JEROME LEE,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. F-Cr-74-83
ROBERT A. GRANT, *Judge.*

ARGUED JANUARY 21, 1976 — DECIDED JULY 21, 1976

Before SWYGERT and BAUER, *Circuit Judges*, and HOFFMAN, *Senior District Judge.*[1]

PER CURIAM. The question presented on this appeal is whether the double jeopardy clause of the Constitution is violated when a person is put to trial twice, the first time on a faulty charge.

The evidence at both trials was identical. Charles Bilskie, a blind person, operated a newspaper and candy concession in the main lobby of the Fort Wayne, Indiana, Post Office. On December 21, 1973 Bilskie had placed his two wallets

[1] The Honorable Julius J. Hoffman, United States Senior District Judge for the Northern District of Illinois, sitting by designation.

containing money in the amount of $66.00 on the counter behind his stand. A postal security officer, Vance Travis, was in the lobby during the day and saw two people talking to Bilskie. One of these was later identified as defendant-appellant Phillip Jerome Lee. Officer Travis saw Lee go behind the counter and after noticing that Lee had Bilskie's wallets in his hand, shouted, "Stop." Lee attempted to escape, but was apprehended by Travis.

The defendant was charged by an information with violating 18 U.S.C. § 13[2] and I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971),[3] (theft while on property under the jurisdiction of the federal government). At his trial, but before any evidence was introduced, the defendant moved that the information be dismissed because it did not include the allegation that the offense was "knowingly" committed. The trial judge took the motion under advisement and proceeded to hear the evidence. At the conclusion of the trial the objection to the faulty information was sustained and the case was dismissed.

The defendant was thereafter indicted for the same offense with the correction that the theft knowingly occurred. After a bench trial, the defendant was found guilty and given a prison sentence.

The sole issue on appeal is whether a retrial of the defendant for the same offense pursuant to a corrected indictment violated his right against double jeopardy.

Recently, in *Serfass* v. *United States*, 420 U.S. 377, 388 (1975), the Supreme Court discussed at what point in a criminal proceeding the double jeopardy clause becomes applicable:

[2] 18 U.S.C. § 13 reads:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

[3] I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971), reads:

Theft in general.—A person commits theft when he (1) knowingly: (a) obtains or exerts unauthorized control over property of the owner; . . .

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> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." (Citations omitted.)

The question, however, of when double jeopardy attaches should not be determined mechanically, as the Court pointed out in *Illinois* v. *Somerville*, 410 U.S. 458 (1973). Rather the question must turn on the particular facts presented by each case. For example, in *Somerville*, the defendant had been indicted for the crime of theft. The case was called for trial and a jury was impaneled and sworn, but before any evidence had been presented the prosecuting attorney brought to the trial court's attention the fact that the indictment was fatally defective. Because the defect was "jurisdictional" under the prevailing state law and could not be waived, the trial judge granted the state's motion for a mistrial. The defendant was reindicted (under proper allegations) for the same offense and a jury returned a verdict of guilty. The Supreme Court held that the double jeopardy clause did not bar the defendant's retrial.

In *United States* v. *Valazquez*, 490 F.2d 29 (2d Cir. 1973), the trial judge dismissed an indictment after he had examined defendant's pretrial motion papers containing allegations of facts going to the issue of guilt or innocence. The allegations were disputed by the Government. It appealed under 18 U.S.C. § 3731, and the defendant pleaded double jeopardy. The Second Circuit allowed the appeal and held that double jeopardy had not been invoked even though the trial court had gone beyond the allegations of the indictment and had con-

sidered evidentiary facts, though not, as the court emphasized, in an adversary trial setting.

In the case at bar, the motion of dismissal was made by the defendant on the day of trial. The dismissal was granted after the evidence was heard, but before any finding was made of guilt or innocence. It was not based on evidence adduced at trial, but rather on the failure of the information to state an essential element of the offense—in short, because of a jurisdictional defect. Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial. Under these circumstances, we conclude that the double jeopardy clause did not bar his retrial.

Double jeopardy does not attach when a defendant secures a reversal of his conviction because of a faulty indictment and after remand he is tried on a new indictment for the same offense. *United States* v. *Ball*, 163 U.S. 662 (1896). There is a certain analogy between this case and the one before us. Had Lee's motion to dismiss been denied and had he been found guilty, his appeal would likely have resulted in a reversal and a remand for retrial. Under *United States* v. *Ball, supra*, a new trial would not constitute double jeopardy.

For these reasons, the conviction is affirmed.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

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